



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

WWW/170166

PRELIMINARY RECITALS

Pursuant to Wis. Stat., §49.152(1), petitioner filed a request for a Wisconsin Works (W-2) fact finding review with Forward Service Corporation, a W-2 agency, on October 8, 2015. A fact finding review was held and a fact finding decision was issued on October 26, 2015.

Petitioner timely appealed to the department from the fact finding decision on November 16, 2015. See Wis. Stat., §49.152(2)(b), (c). The fact finding file was received by the Division on January 11, 2016.

The issue for determination is whether a W-2 overpayment resulted from agency error.

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Represented by:

Atty. [REDACTED]
Legal Action of Wisconsin

[REDACTED]
[REDACTED]

Wisconsin Department of Children and Families
201 East Washington Avenue, Second Floor
Madison WI 53703-2866

By: [REDACTED]
Forward Service Corporation
223 N. Seymour St.
Fond du Lac, WI 54935

FACT FINDER: [REDACTED]

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Fond du Lac County.
2. Petitioner applied for W-2 in December, 2012. During the entire time she received W-2 she owned a home in which her mother resided; her mother paid rent to petitioner. The value of the home would have made petitioner ineligible for W-2.

3. Petitioner reported the home when she applied but was told by a W-2 worker that the home did not affect her case. She did not report it in subsequent contacts with the agency.
4. The agency discovered the home after noting an unearned income match with state records. Initially the agency workers did not realize that petitioner owned the home, but finally learned of the existence of the home in September, 2015.
5. By a series of notices dated September 23 and September 28, 2015 the agency informed petitioner that she was overpaid a total of \$15,864 in W-2 benefits, essentially all W-2 paid from the beginning of petitioner's case in December, 2102 through September 30, 2015, claim nos. [REDACTED], [REDACTED], [REDACTED], and [REDACTED].

DISCUSSION

W-2 is Wisconsin's public assistance work program, and is outlined at Wis. Stat. §§49.141-.161. It supplanted the prior federal-state cash payment program, Aid to Families with Dependent Children (AFDC), described at Wis. Stat. §49.19.

I. STATUS OF FACT FINDING RECORD

The first task of a departmental reviewer, such as this hearing examiner, is to determine whether the fact finding record is sufficient for review. If it is not sufficient, the examiner may remand the matter back to the fact finder, conduct a new hearing (either in person or telephonically), or otherwise augment the record. See Wis. Stat. §49.152(2)(d). In the instant case, the paper record is adequate for the examiner to make sense of the case, and a supplementary hearing was not necessary. The findings of fact above are based on the fact finder's decision, the tape recording of the hearing, and the fact finder's file.

II. STANDARD OF REVIEW

A threshold analytical question is whether the departmental reviewer is reviewing this matter *de novo* or with some unspecified judicial standard of review. This entire due process function is subject to Wisconsin's administrative procedure act, Chapter 227, Wis. Stats., because this type of case satisfies all four prongs of the contested case hearing right test at Wis. Stat. §227.42(1). The Department has also made a public declaration that the entire review process at Wis. Stat. §49.152 is subject to Ch. 227's requirements in the document, Public Hearing Comment & Agency Response, Rule Number : DWD 12, p. 14:

The Department considers that the proceedings under paragraph DWD 12.22(2)(a) will be subject to the provisions of s. 227.44-.49, Wisconsin Stats. The Department does not want to deny anyone the opportunity for a court hearing; however, it is expected that very few cases will lead to court.

Based on the foregoing, the Division of Hearings and Appeals has concluded that the W-2 process function is subject to Ch. 227 requirements.

Having concluded that Ch. 227 applies to the W-2 process function, the Division also concluded that the departmental reviewer must engage in a *de novo* look at the fact finder's decision. In Reinke v. Personnel board, 53 Wis. 2d 123, 191 N.W.2d 833 (1971), the Wisconsin Supreme Court instructed state agency adjudicators to make *de novo* determinations, relying on the greater weight of the credible evidence, in administrative hearings. The Court specifically rejected the use of a judicial review (e.g., "substantial evidence" test) standard by the state agency, "unless expressly otherwise provided by statute." Id., pp. 134-136. There is no judicial review standard articulated in either the W-2 statute or promulgated rule.

The only standard articulation undertaken by the Department is that the examiner's action is "a limited review of the record and the decision of the fact finder." See *W-2 Manual*, Chapter 19, §19.3.0. This is not an articulated judicial review standard, and it is not legally binding on the examiner here.

III. WHETHER THE OVERPAYMENT WAS AGENCY ERROR

W-2 has an asset test for eligibility. Equity in non-exempt assets cannot exceed \$2,500. Wis. Admin. Code, §DCF 101.09(3)(a). Non-homestead real estate is a countable asset. It is undisputed that the non-homestead property owned by petitioner had equity of more than \$2,500 during the entire period she received W-2 benefits.

A W-2 agency must recover any overpayment of benefits. See Wis. Admin. Code, §DCF 101.23(1)(g), which defines an overpayment as any payment in an amount greater than the amount the household was eligible to receive. While overpayments caused by client error or fraud can be recovered entirely, there is a limit for overpayments caused by agency error. Liability for agency error overpayments is limited to one year prior to the date that the agency discovers the overpayment. Adm. Code, §DCF 201.23(3)(c).

In this case it should have been evident that petitioner's defense included at least an alternative claim that the error was not hers but the agency's. Her fact finding request stated:

When first applying for the W-2 program, I asked my W-2 case manager what the proper reporting procedure for my mother's residence since the property was in my name and I was considered a *Landlord* by the *Fond du Lac Housing Authority*.... I was informed at that time by my Case Manager that it would not be reportable as Income. The property was again mentioned by me when applying for the *W-2 Program* Assistance after the loss of my job in January, 2014. Both times, and by both W-2 Case Managers, the property was considered a "non-Income generating property", and it was not brought up by either Case Manager, that the property would or should be considered an AVAILABLE personal asset.

Italics, capitalization, and punctuation are as in the original. During the hearing petitioner testified as stated in the fact finding letter, that she informed at least two W-2 case managers about the property and was told that it did not impact her eligibility. She admitted to not telling her most recent case manager because the questions always concerned whether there were changes to her case.

There is no evidence whatsoever to rebut that testimony. Apparently the earlier case managers no longer work for the agency, and there are no historic case notes dating back to 2012 or 2014 in the file. If petitioner's testimony is credible, then the overpayment would have to be classified as agency error, which would reduce petitioner's liability to only the year prior to discovery.

In response to petitioner's testimony Ms. [REDACTED] recounted only what happened beginning in April, 2015. There is no evidence to rebut petitioner's testimony. It would have been helpful to see case notes dating back to petitioner's W-2 application (or even her Medical Assistance and FoodShare applications, which apparently were earlier) to see if they ever mentioned a non-home property, but those case notes are not in the record. Given petitioner's statement in her fact finding letter, the agency worker should have foreseen that records dating back to the application might be relevant to the case.

The overpayment was discovered in September, 2015, when the home's existence was discovered and the notices issued. Petitioner was paid \$7,968 in W-2 payments for the period beginning September 1, 2014 through September 30, 2015. I agree with petitioner that her liability must be limited to that amount and that the claim must be considered agency error instead of client error.

The result will be that overpayment claim no. [REDACTED] for the period December 21, 2012 through June 30, 2013 will be rescinded entirely. Claim no. [REDACTED] will be reduced to \$2,612 for just the months of September through December, 2014. The other two claims will remain intact.

CONCLUSIONS OF LAW

Petitioner was overpaid W-2 because the value of non-homestead property was not considered in determining her eligibility; the error was made by the agency because petitioner reported the existence of the property W-2 case workers when she applied.

NOW, THEREFORE, it is **ORDERED**

That the matter be remanded to the agency with instructions to rescind overpayment claim no. [REDACTED] to reduce claim no. [REDACTED] to \$2,612 beginning September 1, 2014, and to change the claims to be agency error. The agency shall do so within 10 days of this decision.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing/reconsideration. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Wisconsin Statutes, §227.49. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

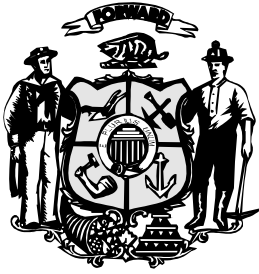
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Children and Families. Appeals must be served on the Secretary of that Department, either personally or by certified mail no more than 30 days after the date of this hearing decision. The address of the Department is 201 E. Washington Avenue, Second Floor, Madison, WI 53703-2866.

The appeal must also be served on the other “PARTIES IN INTEREST” named in this decision. The process for appeals to the circuit court is in Wisconsin Statutes, §§227.52 and 227.53.

Given under my hand at the city of
Madison, Wisconsin, this 15th day of
January, 2016

\sBrian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on January 15, 2016.

Wisconsin Works (W-2)

Attorney [REDACTED] [REDACTED]